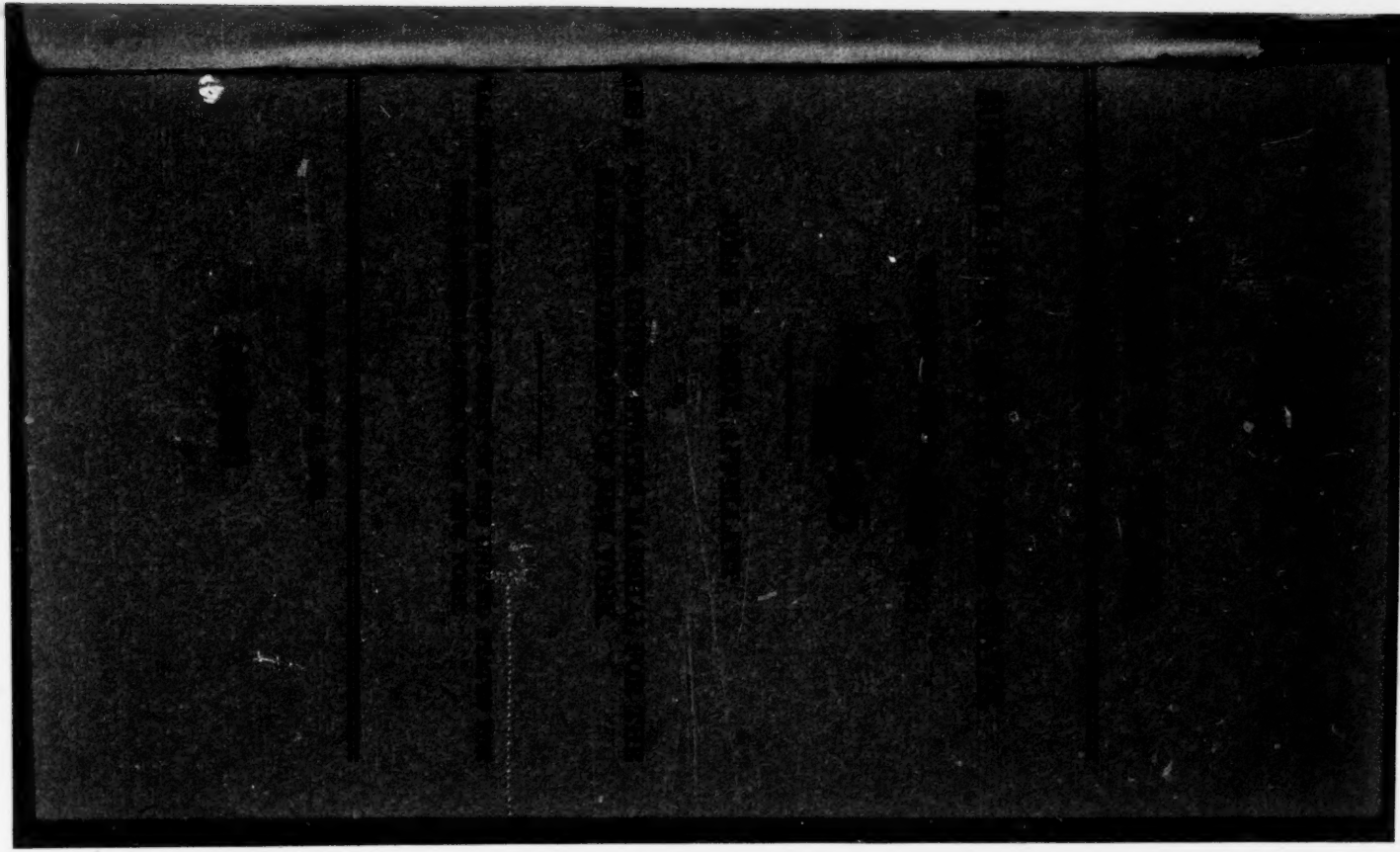

(28,929)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 389.

JOHN H. BREDE, APPELLANT,

vs.

JAMES M. POWERS, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

INDEX.

& Detweiler (Inc.), Printers, Washington, D. C., February 26, 1923.

Citation.

y the Honorable Thomas I. Chatfield, one of the Judges of the United States District Court for the Eastern District of New York, in the Second Circuit, to James M. Powers, United States Marshal for the Eastern District of New York, Greeting:

You are hereby cited and admonished to be and appear before the ıpreme Court of the United States at the City of Washington in e District of Columbia, 30 days from the date hereof, pursuant an appeal filed in the Clerk's Office of the United States District ɔurt for the Eastern District of New York, wherein John H. Brede appellant and you are appellee, to show cause, if any there be, hy the order and decree in said appeal mentioned should not be ɔrrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Brooklyn in the City of ew York in the District and Circuit aforesaid, this 28th day of ebruary in the year of Our Lord One thousand Nine Hundred nd twenty-two, — the one hundred and forty-sixth. Thomas I. hatfield, U. S. D. J.

Assignment of Errors.

United States District Court, Eastern District of New York.

n the Matter of the Application of JOHN H. BREDE for a Writ of Habeas Corpus.

John H. Brede, makes and files this his assignment of errors:

1. The United States District Court for the Eastern District of ew York, erred in dismissing the writ of habeas corpus and reanding him to custody.

2. Said court erred in holding that imprisonment in the County il of Essex County, New Jersey, is not imprisonment at hard labor.

3. Said court erred in holding that imprisonment in the County il of Essex County, New Jersey, for a term of sixty days is not an famous punishment.

4. Said court erred in holding that the crime for which he was osecuted and was convicted, as set forth in the record herein, is t an infamous crime within the meaning of the Fifth Amendment to the Constitution of the United States.

5. Said court erred in holding that the crime for which he was prosecuted and convicted, as set forth in the record rein, can be prosecuted in the United States District Court for e Eastern District of New York, by information and without intment or presentment by the grand jury.

6. Said court erred in holding that the United States District urt for the Eastern District of New York had jurisdiction to prounce the sentence and judgment of conviction in the record deribed.

7. Said court erred in construing and applying the Constitution the United States and particularly the Fifth Amendment thereto,

for the reason said amendment, properly construed and applied required his discharge from imprisonment, same being pursuant t conviction of an infamous crime without indictment or prosecutio by grand jury.

Wherefore he prays that the order and decree made herein b reversed, annulled and held for naught, and for such other relief a may be proper.

Dated, February 28th, 1922. Morris Kamber, Attorney for Ap plicant, Seven Dey Street, Borough of Manhattan, City of Ne York.

4 **Appeal and Allowance.**

[Title omitted.]

Upon the annexed petition and upon the record and all paper had in the cause entitled as above, it is

Ordered that the appeal be allowed, as prayed for, and it is furthe

Ordered that the applicant, John H. Brede, may, at any tim pending said appeal, be enlarged upon executing an undertaking with good and sufficient sureties in the sum of $5,000 for his appear ance to answer any order, judgment or decree, either of the Supreme Court, or of the United States District Court for the Eastern Dis trict of New York, and upon failure to give such undertaking t remain in the custody of the respondent, U. S. Marshal of the East ern District of New York, to be dealt with according to law.

Dated, February 28th, 1922. Thomas I. Chatfield, United State District Judge.

5 [Title omitted.]

The applicant above named, John H. Brede, conceiving himself aggrieved by the order and decree dismissing the writ of habeas corpus, and remanding him to custody, made in the above entitled cause, said cause involving the construction and application of the Constitution of the United States, for the reasons specified in the assignment of errors which is filed herewith, does appeal from said order and decree to the Supreme Court of the United States and prays that this appeal may be allowed, and that a transcript of record, pro ceedings and papers upon which said order was made, duly authen ticated, may be sent to the Supreme Court of the United States.

Dated, February 28, 1922. Morris Kamber, Attorney for Ap plicant, 7 Dey Street, Borough of Manhattan, City of New York.

6 **Writ of Habeas Corpus.**

The President of the United States of America to James M. Power, United States Marshal of the Eastern District of New York, Greeting:

We command you that you have the body of John H. Brede in your custody detained, as it is said, together with the details and cause of his caption and detention, before the Honorable Thomas I. Chatfield, United States District Judge at a Term of the United

States District Court for the Eastern District of New York at the Federal Building at the Borough of Brooklyn, City and State of New York, on the 5th day of January, at 12 o'clock in the noon to do and receive all and singular those things which said Judge and said Court shall then and there consider in this behalf and that you have then and there this writ.

Witness, Honorable Thomas I. Chatfield, and Edwin L. Garvin, Judges of the said District Court on this 5th day of January in the year of Our Lord one thousand nine hundred and twenty-two and of the Independence of the United States the one hundred and fifty-sixth. Percy G. B. Gilkes, Clerk of the United
7 States *States* District Court, Eastern District of New York, by John C. Leavens, Deputy Clerk. (Seal.)

Allowed by Thomas I. Chatfield, U. S. D. J. January 5, 1922.

8 **Petition for Writ of Habeas Corpus.**

[Title omitted.]

To the United States District Court for the Eastern District of New York, the Honorable Thomas I. Chatfield and Edwin L. Garvin, Judges of said Court:

The Petition of John H. Brede respectfully shows:

1. I am now imprisoned in the Federal Building in the Borough of Brooklyn, City and State of New York, within the Eastern District of New York, by the Marshal of said District and I am restrained of my liberty therein by him.

2. The cause and pretense of my imprisonment, according to my best information and belief, is a purported commitment made by the United States District Court for the Eastern District of New York, Honorable Thomas I. Chatfield presiding, under a pretended conviction of a violation of the Act of Congress of the 28th day of October, 1919, commonly known as the Volstead Act.

9 3. Said imprisonment and restraint are illegal and said pretended judgment of conviction and commitment are void for the following reasons: No presentment or indictment of a Grand Jury was ever found against me. There was filed on or about the 7th day of April, 1920, in the United States District Court for the Eastern District of New York by Leroy W. Ross, then United States Attorney for said District, a certain paper writing in the form of an information, a copy of which is hereto annexed as Exhibit A and made part hereof. I was brought into court and required to plead to said document, and I then and there entered a plea of "not guilty" thereto. Thereafter, on or about the 15th day of June, 1920, I was brought to trial before said Court and a jury upon the charge in said document set out. The jury returned a verdict of "guilty." Thereupon said Court, Honorable Thomas I. Chatfied presiding, in form, pronounced judgment against me that I be imprisoned for 60 days in Essex County Jail, New Jersey, and fined the sum of $500-. Pursuant to said pretended judgment the purported commitment aforesaid was delivered to James I. Powers, the United States

Marshal of said District and he, thereupon, pretending to act pursuant thereto and under no other authority whatever, physically took me into custody, imprisoned me and restrained and yet restrains me of my liberty, as aforesaid. On the day when the paper writing in the form of an information was filed with said Court and upon the day when I was required to plead thereto, as well as when I was
10 tried and judgment was, in form, pronounced against me, by reason of the Statutes of the United States, the States of New Jersey and New York and the arrangements, regulations and agreements made by the Attorney General of the United States his deputies and aids and other officials of the United States acting in its behalf, the United States District Court for the Eastern District of New York and the Judges thereof were authorized and had the authority and power to sentence defendants in criminal causes pending in said Court wherein conviction of the crime charged was by Statute punishable by imprisonment for a term of not more than one year, to imprisonment in jails, penitentiaries and prisons, within the State- of New York and New Jersey, wherein hard labor would necessarily be imposed as an indictment to such imprisonment.

4. For the reason aforesaid the United States District Court for the Eastern District of New York never acquired jurisdiction of the pretended criminal action upon which, in form it tried and condemned me, for the reason that the crime of which I was charged and for which said Court sought to try and condemn me is an infamous crime within the meaning of the Fifth Amendment to the Constitution of the United States and no presentment or indictment of a Grand Jury charging same, was ever filed or presented.

I pray therefore that a Writ of Habeas Corpus issue to inquire into the Court of my detention and imprisonment and to
11 discharge me therefrom.

Dated, Brooklyn, New York, January 3, 1922. John H. Brede, Petitioner.

STATE OF NEW YORK,
Eastern District of New York,
County of Kings, ss:

John H. Brede, being duly sworn says:

I am the Petitioner. I have read the foregoing petition and I verily believe that the statements therein made are true. John H. Brede.

Sworn to before me this 5th day of January, 1922. John A. Leavens, Notary Public, Nassau County, N. Y. [Seal.] Certificate filed —— ——.

12 **Return of Respondent.**

[Title omitted.]

To the United States District Court for the Eastern District of New York:

Comes James M. Powers, United States Marshal for the Eastern District of New York, and by way of return to the writ of Habeas

Corpus issued herein on the 5th day of January, 1922, certifies as follows, to wit:

That John H. Brede on the 15th day of June, 1920, was found guilty, after a trial, in the United States District Court for the Eastern District of New York, under an information charging him with a violation of Section 21, Title II, of the Act of Congress of October 28, 1919, and on the 17th day of June, 1920, was sentenced to pay a fine of $5,000 and to be imprisoned for 60 days.

That by an order of this Court of the date of December 17, 1921, the said John H. Brede was ordered to appear in this court on January 3, 1922, to comply with the sentence of the court and
13 that on January 5, 1922, the said John H. Brede was remanded to the custody of your respondent, and held under a commitment issued this day.

That the sentence and order of the court pursuant to which the said John H. Brede was remanded to your respondent's custody were lawful and in accordance with the Statutes and laws of the United States, all of which I hereby certify and have here the body of the said John H. Brede as by said writ I am commanded.

Dated, Brooklyn, New York, January 5, 1922. James M. Power, U. S. Marshal for the Eastern District of New York.

14 **Transcript of Evidence.**

Before Honorable Thomas I. Chatfield, District Judge.

[Title omitted.]

January 9th, 1922.

Appearances: For Relator, Morris Kamber, Esq.; for Respondent, Ralph C. Greene, Esq., U. S. Attorney; Henry J. Walsh, Esq., Assistant U. S. Attorney.

Mr. Walsh filed the return of respondent.

Mr. Walsh offered in evidence the information in the cause of United States v. John H. Brede, together with all the endorsements thereon. Received and considered Respondent's Exhibit 1.

It was stipulated that there has been no indictment or presentment by a grand jury accusing relator of the crime upon conviction whereof he is imprisoned.

It was stipulated that the penal institution to imprisonment in which relator was sentenced is the County Jail of Essex County, State of New Jersey.

Both sides rest.

15 **Order Dismissing Writ of Habeas Corpus.**

[Title omitted.]

A writ of Habeas Corpus having been issued and allowed on the 5th day of January, 1922, directed to the respondent, James M.

Power, United States Marshal for the Eastern District of New York, commanding him to produce the body of the relator forthwith in the United States District Court for the Eastern District of New York and the body of the relator having been produced as directed on said day and the hearing on the said writ having been adjourned to the 9th day of January, 1922 and the relator having been admitted to bail in the sum of $5,000 and the respondent James M. Power, United States Marshal for the Eastern District of New York
16 having filed a return to the writ on January 9, 1922, from which it appears that the relator on the 15th day of June, 1920, was found guilty after a trial in the United States District Court for the Eastern District of New York under an information charging him with a violation of Section 21, Title II of the Act of Congress of October 28, 1919, and that on the 17th day of June, 1920, he was sentenced to pay a fine of $500 and to be imprisoned for 60 days, and that by an order of this court of the date of December 17, 1921, the relator was ordered to appear in this court on January 3, 1922, to comply with the sentence of the court and that on January 5, 1922, the relator was remanded to the custody of the respondent and the within writ having come on to be heard before me on the 9th day of January, 1922, and having been thereafter continued to the 23 day of January, 1922, and having been thereafter continued to the 6th day of February, 1922, and having been thereafter continued to the 28th day of February, 1922, and argument having been had thereon and after due deliberation by the court and the court having filed its written opinion, now upon the papers filed herein and upon all the proceedings had herein and on motion of Ralph C. Greene, United States Attorney for the Eastern District of New York, attorney for the respondent, it is

Ordered, that the writ of Habeas Corpus herein issued out of this court on the 5th day of January, 1922, be and the same hereby is dismissed, and the petitioner is hereby remanded to the
17 custody of the United States Marshal for the Eastern District of New York to serve his sentence under the commitment herein previously issued. Thomas I. Chatfield, U. S. D. J.

18 **Opinion.**

[Title omitted.]

Feb. 25, 1922.

Ralph C. Greene, U. S. Attorney; Henry J. Walsh, Assistant U. S. Attorney, of counsel.

Morris Kamber, attorney for Relator.

CHATFIELD, *J.*: The defendant has been commit-ed to serve a sentence for violation of Section 21, Title 2, of the Prohibition Law, and is before the court upon a writ of habeas corpus. By the writ of habeas corpus he seeks to object to the validity of the procedure by which he was brought into court, tried and convicted, although the time to appeal from said conviction has expired, and although

he is now in the position of not having any appeal pending from said judgment of conviction and sentence.

The defendant was arrested and tried upon an information, and he now contends that because he was sentenced to a jail where
19 hard labor may be required, or because he might be sentenced under such a charge to an institution where hard labor is possible or required, that the proceedings can be instituted only by indictment.

Prior to the adoption of the U. S. Constitution certain crimes were denominated as "infamous," in addition to the many crimes which in those days were classified as "felonies." As law and civilization have progressed, many crimes, even at that time constituted felonies, have been by law (statutory or otherwise) changed to misdemeanors.

The defendant argues that the definition of an infamous crime has not been changed, that by the language of Amendment V to the Constitution, such crimes are left forever triable by jury, and may be instituted only by indictment, even though the crime may be specifically denominated a misdemeanor, or by the length of punishment provided may come within the language of the last part of Section 335 of the Penal Code of the United States, which reads as follows:

"All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

This statute went into effect in 1909, and the present case has arisen since that time.

Any objection to the sufficiency of the indictment or to occurrences during trial, which might be alleged as error, will be cured by failure to seek relief through the suing out of a writ of error,
20 and a writ of habeas corpus cannot be used as a writ of error. Glasgow v. Moyer, 225 U. S., 420, and cases therein cited.

But the defendant contends that where the court had no jurisdiction over the defendant, objection may be raised even during the serving of the sentence and without reference to whether there has or has not been an appeal by writ of error. It is necessary, therefore, to consider whether the United States obtained any valid jurisdiction over the defendant, and over the particular allegation of crime with which he was charged, by the filing of an information in the case. Concededly the information was sufficient to take the place of an indictment if the crime charged was a misdemeanor and not an infamous crime. The sentence actually imposed in this case was to the Essex County Jail in the State of New Jersey, which is an institution where what the defendant contends is the equivalent of "hard labor," that is involuntary work, is required as part of the discipline from those under confinement. Chap. 271, Laws of 1917, N. J.

It is unnecessary to discuss the procedure by which the Department of Justice has made arrangements for the receipt of federal prisoners, under which this court, as a matter of convenience, by

reason of the aforesaid arrangement, sends prisoners to this institution to serve sentence by virtue of Section- 5541 and 5546 of the Revised Statutes.

The defendant is not complaining of the choice of institutions and his sole proposition is that a charge under Section 21 of the Prohibition Law, by rendering the defendant liable to imprisonment
21 in an institution where the equivalent of hard labor accompanies sentence, subjects him to what has been by the Constitution preserved in the class of "infamous" crimes, and therefore that it is capable only of prosecution by indictment.

The question is important in that not only the Prohibition Law but many other of the U. S. Statutes define crimes which cannot be prosecuted upon information if the defendant's contention is correct.

Evidently a crime, even though called a misdemeanor, which carries a possible punishment of more than a year, is an infamous crime and cannot be prosecuted by information. Mackin v. United States, 117 U. S., 348; Ex parte Wilson, 114 U. S., 417. Some such so-called misdemeanors were reclassified by Section 335 of the Criminal Code in 1911. Some of the statutes are of later date, but the word misdemeanor is ineffective. (See the Jones Act of June, 1920.)

The question in the case at bar was decided in this court in the case of United States v. Nelson, 254 Fed., 889, in which opinion the language of the statutes is set forth at length. Their provisions are discussed in a quoted decision from United States v. Cobb, 43 Fed., 570. The Nelson case, however, was not conclusive, inasmuch as the information was filed "in time of war," under Section 12 of the Selective Service Law, and was therefore within the express exception to the Fifth Amendment of the Constitution.

In the case of Yaffee v. United States, 276 Fed., 499 (see also Hunter v. United States, 272 Fed., 235, and Brown v. United States, 260 Fed., 752) it was expressly held that the charge
22 of selling liquor under the Volstead Act was not an infamous crime, and could be prosecuted by information, citing ex parte Wilson, 114 U. S., 417, United States v. Lindsay-Wells Co., 186 Fed., 248, United States v. Quaritius, 267 Fed., 227, United States v. Achen, 267 Fed., 595, United States v. Baugh, 1 Fed., 784.

The argument in all of these cases is based upon the discussion in the Supreme Court in the opinion in ex parte Wilson, supra, which interprets the words "other infamous crime." It is said there that, "What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another." It is also stated that by the first Judiciary Act whipping was treated as a punishment like fines or short terms of imprisonment, "but at the present day either stocks or whipping might be thought an infamous punishment."

It is unnecessary to quote from this decision further, nor from the cases of ex parte Karstendick, 93 U. S., 396, Mackin v. United States, supra, Parkinson v. United States, 121 U. S. 281, United States v. De Walt, 128 U. S., 393, Medley, Petitioner, 134 U. S., 160,

In re Mills, 135 U. S., 263, In re Classen, 140 U. S., 200 (at p. 204), to substantiate the proposition that the classification of the crime either as a felony or misdemeanor, and the determination as to whether it is infamous, depends upon the penalty which may be imposed at the time of sentence.

A crime which was considered "infamous" at the time of the adoption of the Constitution may, at the present time, fall without that category, as the result of subsequent legislation following the trend of public opinion. On the other hand, a crime not known to the common law may have been defined by statute, or a new penalty may have been provided as to some crime previously considered trivial, and its classification as a felony or other infamous crime depends upon the possible scope of sentence at the time when it is imposed.

In the case of In re Logan, 144 U. S., at p. 303, it was held that certain crimes recognized as established in definition and essential elements at the time of the adoption of the Constitution, did not, in the absence of express statute of Congress, change from time to time, if the name of that particular crime was narrowed or broadened under state legislation.

But this in fact decides the proposition that Congress has the right, under the Constitution, to remove a crime from the infamous class, or to change a certain act from the category of felony to that of misdemeanor.

But the defendant contends that Congress has not expressly removed the crime in the case at bar from the class of "infamous" crimes even, though calling it a misdemeanor, inasmuch as Congress allows and apparently contemplates the use of institutions where the so-called infamy of "hard labor" or its equivalent is compelled.

A similar situation with respect to the competency of witnesses was considered in the case of Rosen v. United States and Pakas v. United States, 245 U. S., 467, affirming 237 Fed., 810, and 240 Fed., 350. The dissenting opinion of the Court of Appeals in 237 Fed. at p. 811, presented a similar contention to that of the defendant in the case at bar. But, as settled by the Supreme Court, following the principle set forth in the Logan case, supra, the competency of witnesses in criminal cases depends upon the condition of the law under acts of Congress and judicial construction of those laws with due recognition of the progress and knowledge and public opinion. "The dead hand of the common law of 1789" is not "to be applied to such cases as we have here."

Similarly the meaning of the words "infamous crime" has been changed under the acts of Congress as interpreted in the United States Courts, and is not necessarily in exact similarity to the meaning of those words under State Statutes. Both in State and United States Courts, however, the application of the term "hard labor" *have* become limited in effect. Reform and humane legislation has given those in prison the benefit of a chance to labor both for their mental and physical well being, and even in some cases for the purpose of enabling them to earn some help for their dependent families.

To hold that the steps forward in aiding prisoners and in removing unnecessary hardship are but an extension of the "infamy" which attached to a felon, is contrary to common sense as well as law and no legislation is needed to prevent such an effect. The principle of the Rosen case, supra, fully covers the case at bar.

In so far, therefore, as objection on this ground to a trial upon an information should be deemed waived if not raised on the trial or assigned as error upon appeal, it cannot be raised under a writ of habeas corpus, and the failure to sue out a proper writ of error disposes of the case.

If the question be considered from the standpoint of jurisdiction of the court over the defendant, in answer to the charge presented upon information, the writ must be dismissed upon the merits, and the defendant remanded to the Marshal to serve his sentence under the commitment previously issued. Thomas I. Chatfield, U. S. D. J.

Stipulation Setting Record on Appeal.

[Title omitted.]

It is hereby stipulated that the foregoing consists of a true transcript of the record, as agreed upon by the parties. Dated March 22, 1922. Morris Kamber, Attorney for Relator. Ralph C. Greene, Attorney for Respondent.

Certificate of Clerk.

UNITED STATES OF AMERICA,
Eastern District of New York, ss:

I, Percy G. Gilkes, Jr., Clerk of the United States District Court for the Eastern District of New York, do certify that the foregoing is a true and correct transcript of the record, as agreed upon by the parties.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at the Borough of Brooklyn, City and State of New York, the 23rd day of March, 1922. Percy G. Gilkes, Clerk of the United States District Court, Eastern District of New York, by John A. Leavens, Deputy Clerk. [Seal of the United States District Court, Eastern District of New York.]

Endorsed on cover: File No. 28,929. E. New York D. C. U. S. Term No. 389. John H. Brede, appellant, vs. James M. Powers, United States marshal for the eastern district of New York. Filed May 15th, 1922. File No. 28,929.